

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned March 1, 2006

**ESTATE OF AUDREY MOORE v. NATIONAL HEALTH REALTY, INC.
ET AL.**

**Appeal from the Circuit Court for DeKalb County
No. 8220 John A. Turnbull, Judge**

No. M2006-00233-COA-R10-CV - Filed March 8, 2006

We granted this Tenn. R. App. P. 10 application for an extraordinary appeal for the sole purpose of considering whether the trial court erred in permitting the plaintiff to amend its complaint to add six additional defendants after the applicable statute of limitations had expired. The plaintiff relies on the relation-back provisions of Tenn. R. Civ. P. 15.03 to save its claims against the new defendants. We conclude that there was no mistake concerning the identity of the proper parties and that the new defendants had no notice that they would have been named in the suit but for such a mistake as required by Tenn. R. Civ. P. 15.03. Accordingly, we vacate the trial court's November 15, 2005 order allowing the amendment.¹

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

John B. Curtis, Jr. and Cherie D. Jewell, Chattanooga, Tennessee, for the appellants, National Health Realty, Inc., National Health Corporation; National Healthcare Corporation of Delaware; NHC/Delaware, Inc.; NHC, Inc.' NHC/OP, L.P.; and NHC Healthcare / Smithville, LLC.

Richard C. May and James R. Embrey, Jr., Knoxville, Tennessee; M. Chad Trammell and Matthew E. Wright, Nashville, Tennessee; and John A. Day and Brandon E. Bass, Brentwood, Tennessee, for the appellee, The Estate of Audrey Moore, by Marie Moore Cantrell.

¹Our March 1, 2006 order granting the Tenn. R. App. P. 10 application also vacated the trial court's November 15, 2005 order and granted the appellants other specific relief on an expedited basis in order to avoid unnecessary disruption of the discovery schedule or the scheduled trial date. Pursuant to Tenn. R. App. P. 2, we suspended the application of Tenn. R. App. P. 24, 25 and 29, and found oral argument to be unnecessary pursuant to Tenn. R. App. P. 35(c). See *Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997) (No Tenn. R. App. P. 11 application filed). As contemplated by the March 1, 2006 order, this opinion is entered to provide the basis for the relief granted.

MEMORANDUM OPINION²

I.

On January 12, 2002, Audrey Moore suffered an open head wound during a fall at the DeKalb County nursing home where she was a resident. She received emergency medical care at Baptist DeKalb Hospital and was returned to the nursing home the same day. Six days later, Ms. Moore began vomiting and was transported back to the hospital where she died a short time later.

On January 10, 2003, Ms. Moore's estate filed a wrongful death action against NHC Healthcare, LLC, the hospital, and two doctors who cared for Ms. Moore. Over the following two years, the plaintiff obtained new counsel and amended its complaint to add several additional causes of action.³ The amended complaint named as a defendant only NHC Healthcare, LLC. The defendant responded to the complaints in its actual name, NHC Healthcare/Smithville, LLC, and an order was eventually entered substituting NHC Healthcare/Smithville, LLC as the proper defendant in place of NHC Healthcare, LLC.

On August 26, 2005, the plaintiff filed a motion requesting leave to amend its complaint a second time to add as defendants seven additional companies affiliated with NHC Healthcare/Smithville, LLC. The defendant opposed the motion as untimely and on the ground there had been no mistake as to the identity of the proper party. The trial court granted the motion to amend on November 15, 2005. The defendants subsequently filed a Tenn. R. App. P. 10 application challenging the amendment and several other decisions of the trial court. On March 1, 2006, we granted the application solely with regard to the trial court's November 15, 2005 order permitting the plaintiff to file a second amended complaint adding new defendants.

II.

This court reviews decisions regarding the amendment of pleadings using an abuse of discretion standard. *Henderson v. Bush Bros. & Co.*, 868 S.W.2d 236, 237-38 (Tenn. 1993). We will reverse such decisions only where the trial court applies an incorrect legal standard or reaches

²Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

³The plaintiff has agreed to dismiss four of the new causes of action, and our March 1, 2006 order directed the trial court to enter an order confirming the plaintiff's voluntary dismissal of its claims for violation of the Tennessee Adult Protection Act, for violations of state and federal regulations, and for intentional misrepresentation.

a decision that causes an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

There is no dispute that the second amended complaint naming the additional defendants was filed after the expiration of the statute of limitations. To save its claims against the new defendants, the plaintiff relies on the relation-back provisions of Tenn. R. Civ. P. 15.03. When an amendment seeks to add a defendant to a lawsuit, the claim asserted against the new defendant will be considered filed on the date of the original pleading when the requirements of Tenn. R. Civ. P. 15.03 are met. *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001).

Tenn. R. Civ. P. 15.03 provides:

Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The plaintiff asserts that the defendants to be added in the second amended complaint were on notice of the plaintiff's claims within 120 days of the filing of the original complaint. We agree. However, in addition to timely notice of the institution of the action, Tenn. R. Civ. P. 15.03 requires that a party being brought into an action by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." The plaintiff must show that the failure to name the defendant to be added by the amendment resulted from a mistake concerning the identity of the proper party. *Vincent v. CNA Ins. Co*, No. M2001-02213-COA-R9-CV, 2002 WL 31863290 at *8 (Tenn. Ct. App. Dec. 23, 2002) *perm. app. denied* (Tenn. May 5, 2003). A "mistake" within the meaning of Tenn. R. Civ. P. 15.03 does not exist "merely because a party who may be liable for conduct alleged in the original complaint was omitted as a party defendant." *Smith v. Southeastern Properties, Ltd.*, 776 S.W.2d 106, 109 (Tenn. Ct. App. 1999); *Jenkins v. Carruth*, 583 F.Supp. 613, 616 (E.D. Tenn.1982).

In this case, the only mistake as to the identity of a party was corrected when the trial court substituted NHC Healthcare/Smithville, LLC as the proper defendant in place of NHC Healthcare, LLC. There was no mistake concerning the identity of the other seven corporate entities named in

the second amended complaint. The plaintiff's first lawyer simply did not name them in the original complaint. The plaintiff and its new lawyers are now constrained by that decision.

III.

The November 15, 2005 order permitting the plaintiff to file a second amended complaint adding new defendants is vacated. The proceedings are remanded to the trial court with directions to enter an order denying the plaintiff's motion to file a second amended complaint. The costs are taxed to the plaintiff for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.